

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION III

CACR 05-923

JANUARY 16, 2008

JUSTIN LEE MCDONALD
APPELLANT

APPEAL FROM THE CRAWFORD
COUNTY CIRCUIT COURT
[NO. CR2004-146(I)]

V.

HONORABLE GARY RAY
COTTRELL, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED; MOTION TO BE
RELIEVED IS GRANTED

Appellant Justin Lee McDonald was convicted by a jury of five counts of delivery of methamphetamine, and was sentenced to twelve years in prison for each conviction. The jury recommended that all of the sentences run concurrently. Contrary to that recommendation, the trial court ordered two of the sentences to run consecutively, but concurrently with the remaining sentences, for a total of twenty-four years in the Arkansas Department of Correction.

Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Rule 4-3(j)(1) of the Rules of the Arkansas Supreme Court and Court of Appeals, Mr. McDonald's counsel filed a motion to withdraw on the grounds that the appeal is without merit, and an accompanying brief. However, in an unpublished opinion *McDonald v. State*, CACR05-923, delivered on

January 17, 2007, we ordered supplementation of the record and rebriefing by appellant's counsel. In that opinion, we ordered supplementation to include jury voir dire that had been omitted from the record, and ordered appellant's counsel to address five adverse rulings not contained in his brief.

Pursuant to our directive, the record has now been supplemented and Mr. McDonald's counsel has filed a no-merit brief in compliance with Rule 4-3(j)(1). Mr. McDonald's counsel correctly asserts in his brief that no adverse rulings occurred during jury voir dire. Appellant's counsel has adequately addressed the five adverse rulings omitted from his original brief, as well as each of the other adverse rulings, and explained why each point raised cannot be a meritorious ground for reversal. Mr. McDonald was furnished with a copy of his counsel's brief and notified of his right to file a statement of *pro se* points, and he has filed such a statement, raising three points for reversal. We affirm.

At the trial, the State presented the testimony of two police officers, and a confidential informant named Sonya Lovejoy, to show that Ms. Lovejoy made controlled purchases of methamphetamine from Mr. McDonald on five occasions in February 2004. Each time, Ms. Lovejoy was searched and given buy money, and wore a transmission wire. Two of the transactions occurred at Mr. McDonald's mother's house where appellant lived, one occurred in a motel room, and the other two were conducted in cars parked at restaurants. On all five occasions Ms. Lovejoy returned to the police with quantities of methamphetamine purchased from Mr. McDonald.

After these transactions occurred, Mr. McDonald waived his *Miranda* rights and gave a statement to the police. According to the interrogating officers, Mr. McDonald admitted to all five of the methamphetamine sales. Mr. McDonald advised the police that his mother had made bulk purchases of methamphetamine and provided it to him for sale.

Mr. McDonald testified on his own behalf, and admitted that he had a problem with abusing methamphetamine. However, he denied the allegations that he had sold any to Ms. Lovejoy. Mr. McDonald acknowledged that he previously admitted to the crimes in his statements to the police, but testified that he lied to the police because he feared that otherwise they would search his mother's house and that she would be implicated in criminal activity.

In appellant's counsel's brief, it is noted that the first adverse ruling occurred when the trial court denied Mr. McDonald's motion to dismiss the charges for lack of a speedy trial. Appellant's counsel correctly asserts that no error was committed in denying this motion because, while more than one year had elapsed between his arrest and the trial date (March 6, 2004, through March 10, 2005), there were two court orders granting continuances and excluding a total of 72 days for purposes of a speedy trial, and the appellant failed to timely object to these periods being excluded. *See Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000). Moreover, the periods were excludable pursuant to Ark. R. Crim. P. 28.3(d)(1) because the continuances were due to the unavailability of the chemist's lab reports, which had not yet been completed.

Appellant's counsel also addresses the trial court's denial of his directed verdict motions, and submits that there was no error because there was substantial evidence to support his convictions. When a defendant challenges the sufficiency of the evidence, we view the evidence in the light most favorable to the State and affirm if the verdict is supported by substantial evidence. *See White v. State*, 98 Ark. App. 366, __ S.W.3d __ (2007). Here, a challenge to the sufficiency of the evidence would be meritless in light of the informant's testimony about the drug transactions, the officers' observations, and Mr. McDonald's confession to the police.

Another adverse ruling occurred during the sentencing phase, when Mr. McDonald asked the trial court to follow the jury's recommendations to run all of the sentences concurrently, but instead the trial court ran two of the sentences consecutively. As Mr. McDonald's counsel correctly asserts in his brief, the trial court clearly had the authority to order that sentences be served consecutively. *See Ark. Code Ann. § 5-4-403* (Repl. 2006); *Love v. State*, 324 Ark. 526, 922 S.W.2d 701 (1996). The choice between concurrent and consecutive sentences is vested in the judge, not the jury. *Wing v. State*, 14 Ark. App. 190, 686 S.W.2d 452 (1985).

In addition to the above adverse rulings, Mr. McDonald's counsel has accurately and chronologically identified twenty-eight other adverse rulings that occurred during the proceedings. These adverse rulings included objections related to hearsay, questions calling for speculation, leading questions, relevance, and closing remarks by the prosecutor. Appellant's counsel has adequately addressed each of these adverse rulings and explained

why none could support a meritorious appeal, either because no error was committed or because, even if error could be asserted, it was so slight as to be rendered harmless in light of the overwhelming evidence supporting Mr. McDonald's guilt.

We now turn to Mr. McDonald's *pro se* points on appeal, where he first asserts that the confession used to convict him was not the statement he gave to the police. As the State points out, this issue has not been preserved for appeal because it was not raised below. *See Swanigan v. State*, 336 Ark. 285, 984 S.W.2d 799 (1999). To the extent that Mr. McDonald might also be arguing that his confession was coerced and should have been suppressed, this is not preserved for review because appellant failed to object at trial to the admission of his confession on any basis. *See id.*

For his next point, Mr. McDonald argues that other crimes committed by Ms. Lovejoy should have been admitted into evidence, even though the crimes occurred after his arrest for the current charges. In particular, Mr. McDonald asserts that the jury should have been informed about an incident where Ms. Lovejoy allegedly tried to run him over with a car, and where she allegedly stole his car and tried to cash a check written on one of his deceased grandfather's accounts.

This point is without merit because Mr. McDonald failed to make a proffer of the excluded testimony. Mr. McDonald conceded at trial that there were no convictions for the alleged bad acts, and on cross-examination of Ms. Lovejoy he wanted to question her about these supposed incidents to attack her credibility, but the trial court would not allow it. What is critical to our determination of this point is that defense counsel failed to go forward and

make any proffer of what Ms. Lovejoy's testimony would have been. He only advised the trial court that he wanted to pose certain questions to her. Hence, we can only speculate about Ms. Lovejoy's answers to the proposed questions and any resulting prejudice. *See Halford v. State*, 342 Ark. 80, 27 S.W.3d 346 (2000). The supreme court has held, and our rules require, that when challenging the exclusion of testimony, an appellant must make a proffer of the excluded evidence at trial so that we can review the decision, unless the substance of the evidence is apparent from the context. *Id.*; Ark. R. Evid. 103(a)(2). Moreover, as appellant's counsel points out on his brief, the appellant was permitted to attack Ms. Lovejoy's credibility with her conviction for first-degree robbery, which she had recently committed in Oklahoma.

Mr. McDonald's remaining *pro se* point is that the trial court's reason for increasing his sentencing was unjust, and he cites *Blakely v. Washington*, 542 U.S. 296 (2004). However, as stated previously, the trial court was not bound by the jury's recommendation to run all five sentences concurrently, and it was well within the trial court's discretion to order two of the twelve-year sentences to run consecutively for a total of twenty-four years' imprisonment. *See* Ark. Code Ann. § 5-4-403 (Repl. 2006); *Love v. State*, *supra*.

Based on our review of the record, the brief presented by appellant's counsel, and appellant's *pro se* points, we conclude that there has been full compliance with Rule 4-3(j)(1) and that this appeal is without merit. Appellant's counsel's motion to be relieved is granted and appellant's convictions are affirmed.

Affirmed; motion to be relieved is granted.

GRIFFEN and MARSHALL, JJ., agree.